No. 86-1349

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NATIONAL TREASURY EMPLOYEES UNION, *et al.*,
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, *et al.*,

Petitioners,

v.

RONALD REAGAN, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY MEMORANDUM FOR PETITIONERS

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REPLY MEMORANDUM FOR PETITIONERS

We submit this reply memorandum to respond to certain erroneous contentions made by the government.

1. Contrary to the government's assertion, the court of appeals' decision is not consistent with this Court's recent decision in *Alaska Airlines, Inc. v. Brock*, 55 U.S.L.W. 4396, —— U.S. —— (March 25, 1987). In *Alaska Airlines*, this Court held that the unconstitutional legislative veto provision in the Airline Deregulation Act of 1978 was severable from provisions of the Act which

gave "first hire" protection to airline employees who suffered dislocation as a result of deregulation. The Court's analysis in *Alaska Airlines* is helpful to petitioners' position in several ways.

a. First, the Court's decision explicitly recognizes a point central to the Unions' contention that, absent the check of the Pay Act's legislative veto, the President's alternative pay plan authority is an unconstitutional delegation of legislative authority. We have stressed that, in the wake of *INS v. Chadha*, 462 U.S. 919 (1983), close scrutiny must be given to broad delegations of congressional authority made in statutes containing the now unconstitutional legislative veto (Pet. 7, 11). The Court's *Alaska Airlines* decision instructs that:

> it is necessary to recognize that the absence of the veto necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government. Thus, it is not only appropriate to evaluate the importance of the veto in the original legislative bargain, but also to consider the nature of the delegated authority that Congress made subject to a veto. Some delegations of power to the Executive . . . may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism.

55 U.S.L.W. at 4398.

The Court's observation is especially pertinent for the instant case. As we have argued, the absence of the veto has dramatically altered the scheme of the Pay Act and has created an unchecked—and unconstitutional—imbalance of power between Congress and the President. Without the veto, the Pay Act's alternative pay provision now gives the President unguided unilateral authority to set federal pay at whatever level he chooses (see Pet. 10-15).

The government asserts that the alternative pay provision, without the legislative veto, is not an unconstitu-

tional delegation of legislative authority because Congress has ratified the alternative plans for the years in question (Resp. br. 19, n.6). As we show below, no such ratification has occurred. Even if Congress had ratified those specific plans by passing legislation, that, of course, would fail to cure the delegation defect that still remains in the Pay Act.

b. The Court's reasoning, in *Alaska Airlines*, as to why the employee protections provision of the Airline Deregulation Act should survive the absence of the legislative veto provision is also instructive for resolution of the severability issue in the instant case.

The legislative veto provision at issue in *Alaska Airlines* governed issuance of Labor Department regulations regarding the administration of the Deregulation Act's employee protection provisions. In severing the veto from the Deregulation Act, the Court pointed to the detailed affirmative duty the statute's "first hire" provision imposed on air carriers. As the Court noted, the effectuation of these provisions "scarcely" needed the administrative regulations that the Secretary of Labor would issue. *Id.*, at 4399.

Describing the Secretary's role in the statutory scheme as "ancillary" and "subsidiary," the Court stated that the veto provision would therefore affect only "relatively insignificant action" the Secretary might take. *Id.* Given the fact that there was "little of substance" subject to the veto, the Court inferred that Congress would have been satisfied with the duty-to-hire provision even without the veto power. In further support of this conclusion, the Court noted that the legislative history of the Deregulation Act revealed that Congress considered employee protection to be a critical feature of the Act, while it paid scant attention to the legislative-veto provision. *Id.*, at 4400-4401.

In marked contrast to *Alaska Airlines*, it cannot be said that the Pay Act's scheme left "little of substance to be subject to a veto." Here, the veto is explicitly linked to the President's alternative pay plan authority. Because the exercise of the alternative pay plan option is, by definition, at odds with the central purpose of the Pay Act—pay comparability—the pivotal importance of the veto can hardly be doubted.[1] Where, as here, the alternative pay plan provision represents an exception to the Act's policy of pay comparability, it is clear that, without the check of the veto, the Pay Act cannot now function "in a *manner* consistent with the intent . . ." of the 1970 Congress that enacted the Pay Act. *Id.*, at 4398 (emphasis added).

2. The government's mischaracterization of the Pay Act's legislative history requires a response.

First, the government unsuccessfully attempts to establish that the alternative pay plan provision was an integral element of the Pay Act. Examination of the legislative debates reveals that no member of Congress mentioned the provision except in passing. When the alternative pay provision was mentioned it was always noted that it was subject to the one-House veto (see Pet. 22-23). For example, Rep. Udall, the key architect of the Pay Act, stated that "[p]art and parcel to the alternative plan procedure is the congressional review procedure." 116 Cong. Rec. 44285. Moreover, the government can point to no member of Congress who cited the alternative pay provision as a reason for his or her support of the Pay Act.[2]

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[1] As we have described (Pet. 22), the alternative pay plan provision actually received little congressional attention; Congress' central focus was on establishing a statutory procedure for automatic, annual comparability pay adjustments for federal employees.

[2] The government is left to rely on the hearings testimony of certain "Administration witnesses." (Resp. br. 9). We note that, as a general matter, the views of Administration spokesmen shed little

Second, the government asserts that if the legislative veto alone is severed, the Act will still function in a manner consistent with the intent of Congress because Congress can always enact a new law overriding the President's alternative plan (Resp. br. 10-11). The government cites legislative history in which some members recognized the potential need to enact new legislation in a particular fiscal year where Congress was unhappy with the President's alternative plan proposal and also wanted something less than a full comparability increase (Resp. br. 11). But, contrary to the government's suggestion, Congress *never* contemplated that it would have to pass new legislation to achieve the very thing the Pay Act was designed to accomplish: pay comparability (see Pet. 24, n.23).

Finally, the government contends that if the alternative pay provision were excised, the President's role in the Pay Act's scheme would be merely ministerial; the government, citing legislative history, states that many members of Congress would not have voted for the Pay Act if it had not given the President alternative pay authority (Resp. br. 12). But, as we have explained (Pet. 26-27), what that legislative history actually reveals is that some members of Congress wanted to ensure the President some role in the paysetting process (*see e.g.*, 116 Cong. Rec. 44283-85) and that this concern was met

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light on the views of the Congress. In any event, the testimony of the witnesses in question is consistent with our view of the legislative history. These spokesmen did not suggest that they supported an alternative pay provision without a legislative veto; indeed, they recognized that the President's exercise of his authority under the alternative pay plan provision was subject to the check of the veto. *Compensation in the Federal Classified Salary System: Hearings on H.R. 18403 and H.R. 18603 Before the Subcomm. on Compensation of the Committee on Post Office and Civil Service*, 91st Cong. 2d Sess. 2, 56, 75 (testimony of Robert Hampton, Chairman, Civil Service Commission and Arnold Weber, Associate Director, Office of Management and Budget).

by including the President in the preparing of the pay comparability report and the implementing of the pay adjustment.[3]

3. Apparently recognizing the weakness of its severability argument, the government argues, for the first time in this litigation, that, even if petitioners' position regarding the severability issue is correct, no relief is available to the Unions. Specifically, the government maintains that Congress has, through enactment of several appropriations measures, "ratified" the President's alternative pay plans for the four fiscal years in question. The government's argument misses the mark for several reasons.

First, the government's argument ignores that, apart from their claims for back pay, the Unions also seek declaratory relief from the continued unlawful operation of the Pay Act's alternative pay provision (see *e.g.*, NTEU Second Amended Complaint; J.A. 40). The al-

[3] The government characterizes as "concessions" (Resp. br. 13) two statements made in our petition. First, the government asserts that we have "conceded" (*id.*) that it is self-evident that Congress wanted to provide the possibility of an alternative to pay comparability. Of course, our observation is hardly remarkable given the existence of the alternative pay provision in the act. But, as this Court's analysis in *Alaska Airlines* demonstrates, the mere existence of the provision in the Act hardly answers the question of whether Congress viewed it as integral to the Act's scheme.

The government additionally indicates that we "concede" that whether Congress would have legislated full pay comparability without the alternative pay provision is pertinent to this case (Resp. br. 13; Pet. 16-17). Our statement was made in the context of criticizing the court of appeals' severability analysis. Of course, the question of whether Congress would have enacted comparability without *some* alternative plan provision is relevant to whether any part of the Pay Act should remain if both the legislative veto and alternative plan authority are stricken. But a critical flaw in the court of appeals' decision is that it did not focus on whether Congress would have adopted the *Act's* alternative pay provision without the check of the veto.

ternative pay provision remains in place as operative law and has now been implemented four times since 1980. In the absence of repeal or substantive amendment of that provision of the Act, the Unions are certainly entitled—and we do not understand the government to argue otherwise—to an adjudication of their claim for prospective relief from the illegal alternative pay provision.

Nor is the government correct that Congress has "ratified" the alternative pay plans for the years in question. For example, with regard to the alternative plan for fiscal year 1985—the only plan challenged by petitioner National Treasury Employees Union—the government maintains that Congress ratified the plan when it enacted Title II of the Supplemental Appropriations Act of 1985, Pub. L. No. 99-88, 99 Stat. 363. That statute simply made available to certain federal agencies monies needed for federal pay raises that became effective in January, 1985, pursuant to the President's alternative pay plan for that fiscal year. The government deduces, from enactment of the 1985 appropriations measure, that Congress meant to "ratify" the pay increase effected by the President's alternative pay plan.

It is now well established that the mere appropriation of funds does not constitute ratification. *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944). As one court of appeals has stated, "[r]atification by appropriation will not be found unless the government has sustained 'the heavy burden of demonstrating congressional knowledge of the precise course of action alleged to have been acquiesced in.'" *Rincon Band of Mission Indians v. Harris*, 618 F.2d 569, 573 (9th Cir. 1980), quoting *City of Santa Clara v. Andrus*, 572 F.2d 660, 672 (9th Cir. 1978), *cert. denied*, 439 U.S. 859 (1978). The "appropriation must plainly show a purpose to bestow the precise authority which is claimed." *Ex parte Endo, supra*, 323 U.S. at 303, n.24.

The government obviously has not met its "heavy burden" here. The 1985 appropriations statute clearly falls far short of demonstrating that Congress specifically endorsed as satisfactory either the 1985 pay increases or the President's use of the alternative plan authority. While the 1985 statute made necessary funds available, it simply never addressed the merits of the pay increase and it certainly did not sanction the President's now unilateral authority to set federal pay through the alternative pay provision. The fact that the accompanying House Report adverts to the Executive Order, implementing the 1985 pay increases, obviously does not even show that the committee, much less the Congress as a whole, considered or approved the President's use of the alternative pay authority.

The government additionally contends that a budget authorization measure for fiscal year 1986 and an appropriations enactment for fiscal year 1987 demonstrate implicit approval of existing federal pay rates which have been determined, in part, by the alternative pay plans under challenge. But all those statutes show is how Congress chose to address federal pay for those particular fiscal years; those measures obviously fail to demonstrate any conscious decision to endorse retroactively the pay plans in question.[4] For similar reasons,

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[4] The government further suggests (Resp. br. 17-18) that section 15201(a)(2) of the Consolidated Omnibus Budget Reconciliation Act of 1985 ratifies continued submission of alternative pay plans. But the statutory language cited by the government simply does not speak to the critical question of whether Congress actually intended to ratify a re-constituted Pay Act that now gives the President unilateral authority to set federal pay through issuance of alternative plans. Indeed, even the accompanying Senate Report, on which the government heavily relies, describes the pay-setting process as including "Presidential alternative pay *proposals and subsequent Congressional action.*" S. Rep. 99-146, 99th Cong., 1st Sess. 432 (1985) (emphasis added). That committee language hardly amounts

the government cannot convincingly argue that the Omnibus Budget Reconciliation Act of 1983 ratified the pay adjustments made through the alternative pay plans for fiscal years 1980, 1981 and 1982.[5]

Finally, we note that considering the current state of the Pay Act—that the legislative veto is unconstitutional, but the President continues to use the alternative plan authority to set pay at whatever level he chooses—Congress can do little more than appropriate the full amount the President recommends. To provide more would require a veto-proof majority in Congress. The delicate balance between the branches of government has therefore been upset to such a degree that if the Congress wants comparability in a given year, it needs a supermajority to re-legislate that which it already enacted in 1970. Viewed against this backdrop, the government's suggestion that Congress has ratified the President's alternative plan authority is particularly unpersuasive.

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to an endorsement of the President's unilateral power to set pay under the Pay Act; to the contrary it describes the President's role as that of only proposing pay alternatives.

[5] We note also the government's argument that *Chadha* should not be applied retroactively to affect the alternative pay plans for fiscal years 1980, 1981 and 1983, which are challenged by petitioner American Federation of Government Employees. On balance, the factors relevant to the issue of retroactivity weigh in favor of retrospective application. First, considerable doubt existed prior to *Chadha* with respect to the constitutionality of legislative veto provisions. See *Alaska Airlines Inc. v. Donovan*, 766 F.2d 1550, 1557 (D.C. Cir. 1985). Second, no substantial inequitable results would follow from retroactive application. While budgetary planning for the years in question may have been based on the assumption of the validity of the alternative plans, that does not justify depriving employees of pay that was denied them by unconstitutional means. Finally, the holding of *Chadha* would be furthered by retroactive application. If, as we argue, the alternative pay provision is inextricably connected to the legislative veto, it hardly seems a vindication of *Chadha* to allow that provision to be effective for the years at issue.

For the reasons stated above, and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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